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**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

WILLIAMS COMMUNICATIONS, INC.,

Plaintiff and Respondent,

v.

SEYMOUR LAZAR et al.,

Defendants and Appellants.

E030677

(Super.Ct.No. RIC 337241)

OPINION

APPEAL from the Superior Court of Riverside County. Gloria Connor Trask, Judge.  
Affirmed.

Best, Best & Krieger and Douglas S. Philips for Defendants and Appellants.

Nossaman, Guthner, Knox & Elliott, James C. Powers, Karen McLaurin and David S.  
Gregoire for Plaintiff and Respondent.

1. Introduction

Plaintiff Williams Communications, Inc., a public utility, sought to condemn and acquire easements and a right of way on property owned by defendants Seymour and A.J. Lazar for the purpose of installing a fiber optic line from Colton, California to the Arizona

border. In granting plaintiff's motion for summary adjudication, the trial court found that plaintiff had the right to take the property by eminent domain. On appeal, defendants claim the court erred in granting the motion because there were unresolved factual disputes regarding the adequacy of notice and the amount of just compensation.

We conclude that plaintiff was not required to provide defendants with notice of its application for a certificate of public convenience and necessity. We also conclude that the court was not required to resolve the issue of just compensation before granting plaintiff's motion for summary adjudication on the right to take issue. We affirm the trial court's judgment.

## 2. Factual and Procedural History

On October 21, 1999, the California Public Utilities Commission (CPUC) granted plaintiff, a telephone company regulated by the CPUC, a certificate of necessity and convenience for its fiber optic cable installation project. The project required the acquisition of property interests in Riverside County from Riverside to the Arizona border.

On December 27, 1999, plaintiff brought this action in eminent domain against defendants to acquire certain easements and a right-of-way necessary to expand its fiber optic cable lines. Defendants own vacant real property located west of Palm Springs in Riverside County. The property sought to be condemned has existing pipelines, one of which is used to transport petroleum products and the other is leased by plaintiff to install its fiber optic cable lines.

Plaintiff requested and was granted prejudgment possession. Plaintiff also deposited \$1,800 into court as the amount of probable compensation.

On August 4, 2000, plaintiff filed a motion for summary adjudication on the issue of its right to take the property in eminent domain and other related issues. In their opposition, defendants claimed that summary adjudication was inappropriate because the court's determination on the right to take issue would not resolve the entire cause of action, and, in particular, the issue of just compensation.

Plaintiff filed a motion to bifurcate the issue of its right to take from the issue of compensation. The court granted plaintiff's request.

The court also granted plaintiff's motion for summary adjudication. The court found that plaintiff had the right to exercise eminent domain and that taking the existing easements was both necessary to the public good and the least harmful to defendants' property interests.

The court later granted plaintiff's unopposed motion for summary judgment on the issue of just compensation.

### 3. Standard of Review

A trial court may grant summary adjudication “. . . only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.”<sup>1</sup> In reviewing a trial court's ruling on a motion for summary adjudication, we apply our independent judgment to determine whether there is no triable issue of material fact such

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<sup>1</sup> Code of Civil Procedure section 437c, subdivision (f)(1); *Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 433.

that the moving party is entitled to adjudication as a matter of law.<sup>2</sup> We first look to the pleadings and then determine whether the moving party has presented facts to negate an essential element of, or establish a complete defense to, the cause of action.<sup>3</sup> If the moving party has satisfied this burden, we then determine whether the plaintiff has demonstrated the existence of a triable issue of material fact.<sup>4</sup>

#### 4. Notice

Defendants claim that the court erred in granting summary adjudication because they never received adequate notice of the CPUC application and an opportunity to be heard before the issuance of the certificate of convenience and necessity. Plaintiff responds that, in failing to raise this affirmative defense in their answer to the complaint, defendants waived their right to challenge the adequacy of notice in their opposition to plaintiff's motion for summary judgment. Plaintiff alternatively argues that defendants were not entitled to notice or a hearing in the context of CPUC's quasi-legislative act or a public utility's exercise of eminent domain.

In regards to plaintiff's waiver argument, our review of the record indicates that defendants, before answering plaintiff's complaint, demurred on the grounds that plaintiff

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<sup>2</sup> Code of Civil Procedure section 437c, subdivisions (c) and (f)(1); *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.

<sup>3</sup> *Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112, 118.

<sup>4</sup> *Casey v. Overhead Door Corp.*, *supra*, 74 Cal.App.4th at page 118.

failed to comply with the “resolution of necessity”<sup>5</sup> requirement of the Eminent Domain Law.<sup>6</sup> In particular, defendants asserted that plaintiff failed to provide defendants with notice and an opportunity to be heard at a hearing before the passage of any resolution. Furthermore, during the proceedings below, the parties fully litigated the notice issue during the hearing on the demurrer and again during the proceedings on the motion for summary judgment. We conclude that, while defendants did not raise the lack of notice as an affirmative defense in its answer, they informed the court and the opposing party of their objection in a timely manner.<sup>7</sup>

As to defendants’ substantive claim, our review of the pertinent law reveals that neither plaintiff nor the CPUC was required to comply with the resolution of necessity provisions, including the notice and hearing requirements, of the Eminent Domain Law in condemning private property necessary for plaintiff’s fiber optic cable installation project.

Section 1240.040 of the Code of Civil Procedure provides: “A public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4.” Under Section 1245.220 of the Code of Civil Procedure, “[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution

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<sup>5</sup> Code of Civil Procedure section 1245.210 et. seq.

<sup>6</sup> Code of Civil Procedure section 1230.010 et seq.

*[footnote continued on next page]*

of necessity that meets the requirements of this article.” In particular, the governing body, in adopting a resolution of necessity, must provide each affected person with notice and an opportunity to be heard on the matter.<sup>8</sup>

While the resolution of necessity provisions require certain procedural safeguards, they apply to public entities, not public utilities. “‘Public entity’ includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.”<sup>9</sup> A public utility corporation is neither a public entity nor a quasi-public entity within the meaning of the Eminent Domain Law.<sup>10</sup> Defendants’ reliance on cases involving public entities, therefore, is misplaced.

Other statutory provisions, however, authorize and govern a public utility’s exercise of eminent domain power.<sup>11</sup> “The power of eminent domain may be exercised to acquire property only for a public use.”<sup>12</sup> The Legislature’s grant of eminent domain power for a particular use, purpose, object, or function constitutes a declaration that such application

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<sup>7</sup> See 8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, section 992, page 549.

<sup>8</sup> Code of Civil Procedure section 1245.235, subdivision (b)(1) through (3); see also *Conejo Recreation & Park Dist. v. Armstrong* (1981) 114 Cal.App.3d 1016, 1021.

<sup>9</sup> Code of Civil Procedure section 1235.190.

<sup>10</sup> Code of Civil Procedure sections 1235.190 and 1245.320.

<sup>11</sup> See Public Utilities Code section 610 et seq.

<sup>12</sup> Code of Civil Procedure section 1240.010.

satisfies the public use requirement.<sup>13</sup> Section 616 of the Public Utilities Code authorizes a telephone corporation to condemn any property necessary to construct and maintain its telephone lines.

This authority, while broad, is not unbridled. Before the construction of any telephone line, the telephone corporation must request and obtain from the CPUC a certificate of public convenience and necessity.<sup>14</sup> The CPUC may issue the requested certificate with or without a hearing.<sup>15</sup> At the time, CPUC had no statutory obligation to provide private property owners with notice of a public utility's application for a certificate of convenience and necessity.<sup>16</sup> Although CPUC approval is necessary for the construction of the project, the certificate is not a condition precedent to the exercise of eminent domain power.<sup>17</sup>

Nevertheless, before taking property by eminent domain, the public utility must comply with the general requirements of the Eminent Domain Law.<sup>18</sup> Section 1240.030 of

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<sup>13</sup> Code of Civil Procedure section 1240.010.

<sup>14</sup> Public Utilities Code section 1001.

<sup>15</sup> Public Utilities Code section 1005, subdivision (a).

<sup>16</sup> But see Public Utilities Code section 625, effective January 1, 2000, added by Statutes 1999, chapter 774, section 3, page \_\_\_\_ (requiring notice and public hearing); 1 Matteoni & Veit, *Condemnation Practice in California* (2d ed. 2001) Public Use and Necessity Defenses, section 6.7, page 238.1.

<sup>17</sup> See *Pacific Gas & Electric Co. v. Parachini* (1972) 29 Cal.App.3d 159, 166.

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the Code of Civil Procedure provides: “The power of eminent domain may be exercised to acquire property for a proposed project only if all the following are established: [¶] (a) The public interest and necessity require the project. [¶] (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. [¶] (c) The property sought to be acquired is necessary for the project.” An allegation of necessity as required under this provision must be included in the public utility’s complaint in eminent domain.<sup>19</sup>

Under the Eminent Domain Law, public utilities such as telephone corporations begin the process of taking property by filing a complaint in superior court unless, of course, the parties reach an agreement.<sup>20</sup> It is within the superior court proceedings that a private property owner is afforded his procedural due process rights to contest the taking or the amount of just compensation.<sup>21</sup>

The Fifth Amendment of the United States Constitution and article 1, section 18 of the California Constitution prohibit the taking of private property for public use without just compensation. Both federal and state Constitutions also prohibit the deprivation of

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<sup>18</sup> Code of Civil Procedure section 1235.020.

<sup>19</sup> Code of Civil Procedure section 1250.310.

<sup>20</sup> See Code of Civil Procedure section 1250.010; see *San Diego Gas & Elec. Co. v. Lux Land Co.* (1961) 194 Cal.App.2d 472, 478-479; see also *Central Pacific Ry. Co. v. Feldman* (1907) 152 Cal. 303, 308.

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property without due process.<sup>22</sup> “Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. [Citations.]”<sup>23</sup> Due process, however, does not require notice and a hearing before a determination as to the necessity of a public improvement or project for which the property is sought to be taken.<sup>24</sup> Under the federal and state Constitutions, so long as the state provides an adequate process for the private property owner to seek and obtain just compensation for a taking of the property for a public use, due process is satisfied.<sup>25</sup> Accordingly, insofar as public utility corporations are concerned, the filing of an eminent domain action provides the private property owner with due process before taking the property for a public use.

In this case, plaintiff obtained a certificate of convenience and necessity from the CPUC for its fiber optic cable installation project. Based on the CPUC’s finding of necessity, plaintiff filed a complaint in eminent domain. Plaintiff’s complaint included the

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<sup>21</sup> 1A Sackman, Nichols on Eminent Domain (3d ed. 2000) Due Process/Equal Protection, sections 4.7 and 4.8, pages 4-31-4-47.

<sup>22</sup> United States Constitution, 5th and 14th Amendments; California Constitution, article 1, section 7.

<sup>23</sup> *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.

<sup>24</sup> 1A Sackman, Nichols on Eminent Domain, *supra*, Due Process/Equal Protection, section 4.103[1], pages 4-80-4-81.

<sup>25</sup> *Williamson Co. Regional Planning v. Hamilton Bank* (1985) 473 U.S. 172, 194-195.

following allegations: that the public interest and necessity require plaintiff's project; that the project requires the acquisition of defendants' property; and that the project is planned and located in a manner that is most compatible with the greatest public good and the least private injury. In support of its motion for summary judgment, plaintiff provided evidence to establish the truth of these allegations. Defendants do not challenge the trial court's ruling as to the necessity of the taking for public use.

Defendants only argue that they should have been given notice and a hearing before the CPUC's issuance of the certificate of convenience and necessity. Defendants, however, fail to provide any constitutional or statutory authority that required more than a judicial determination of a public utility's right to take their property by eminent domain. While the better practice may be to afford all affected property owners with notice and a public hearing on the project itself,<sup>26</sup> the record indicates that plaintiff complied with existing law at the time by initiating the eminent domain proceedings in superior court.

Defendants fail to show, therefore, that the court erred in granting summary adjudication on the right to take issue based on any failure to provide adequate notice of plaintiff's application for a certificate of convenience and necessity.

#### 5. Just Compensation

Defendants also claim that the trial court erred in granting summary adjudication without deciding the issue of just compensation.

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<sup>26</sup> See Public Utilities Code section 625.

Under Code of Civil Procedure section 437c, summary adjudication does not require the resolution of an entire cause of action.<sup>27</sup> As stated above, a trial court also may grant summary adjudication if it completely disposes of certain issues including the issue of duty.<sup>28</sup> As used in this context, “duty” is not limited to a negligence cause of action.<sup>29</sup> In this eminent domain action, the determination that the public utility had a right to take defendants’ property in eminent domain essentially established liability for the taking. Hence, the determination on the right to take completely disposes of the issue of duty (i.e., the public utility’s proper exercise of eminent domain power and its corresponding duty to pay compensation for the taking).

The only remaining issue is the amount of compensation or damages. While there should be no lingering dispute over the particular substantive area for which a motion for summary adjudication was filed,<sup>30</sup> other separate and distinct issues, including the amount of compensation in an eminent domain case, may be addressed after the court’s ruling on

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<sup>27</sup> See Code of Civil Procedure section 437c, subdivision (f)(1).

<sup>28</sup> Code of Civil Procedure section 437c, subdivision (f)(1); *Transamerica Ins. Co. v. Superior Court* (1994) 29 Cal.App.4th 1705, 1713.

<sup>29</sup> *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 518-519.

<sup>30</sup> See, e.g., *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 92; *Regan Roofing Co. v. Superior Court*, *supra*, 24 Cal.App.4th at pages 436-438.

the motion.<sup>31</sup> This result would promote the efficient adjudication of certain matters that can be decided as a matter of law without the full-blown procedures of a trial.<sup>32</sup>

Indeed, the measure of just compensation presents an entirely separate issue in an eminent domain proceeding. A complaint in eminent domain does not require any statement concerning compensation.<sup>33</sup> Additionally, neither the plaintiff nor the defendant bears the burden of proof as to the issue of compensation.<sup>34</sup> The defendant, however, commences the compensation phase of the eminent domain proceedings and bears the initial burden of producing evidence.<sup>35</sup> Compensation, therefore, is not part of the plaintiff's affirmative case.

Furthermore, when there is a contested issue as to the plaintiff's right to take property by eminent domain, the court generally must hear and determine that issue before moving on to the issue of compensation.<sup>36</sup> The right to take and the amount of

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<sup>31</sup> See *Linden Partners v. Wilshire Linden Associates*, *supra*, 62 Cal.App.4th at pages 1711, 1713.

<sup>32</sup> See *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323.

<sup>33</sup> Code of Civil Procedure section 1250.310.

<sup>34</sup> Code of Civil Procedure section 1260.210, subdivision (b); *Redevelopment Agency v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 474.

<sup>35</sup> Code of Civil Procedure section 1260.210, subdivision (a).

<sup>36</sup> Code of Civil Procedure section 1260.110.

compensation issues present separate and distinct substantive areas. The court, therefore, may resolve the first by summary adjudication before deciding the latter.

The goal of judicial efficiency is further served in cases such as this one where the dispute primarily revolves around the taking of a particular easement, rather than the amount of compensation. Here, plaintiff sought to condemn property on which there was a preexisting easement. The additional burden anticipated by plaintiff's fiber optic cable line installation and maintenance project, therefore, was minimal. As found by the trial court on plaintiff's subsequent motion for summary judgment on the issue of compensation, in such cases, defendants are entitled to only nominal damages.<sup>37</sup> "... [I]f a public entity seeks to condemn an easement over land already subject to an easement, the value of the second easement is the difference in value of the strip of land before and after the imposition of the second easement. This value may only be nominal."<sup>38</sup> Defendants, in this case, did not oppose plaintiff's motion for summary judgment on the issue of just compensation. Thus, the court's early resolution on the right to take issue led to the efficient adjudication of the entire matter.

We conclude that the trial court did not err in granting summary adjudication on the issue of plaintiff's right to take defendants' property without first deciding the issue of just compensation.

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<sup>37</sup> See *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 389-390, and footnote 4.

<sup>38</sup> *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1280.

6. Disposition

We affirm the trial court's judgment. Plaintiff shall recover its costs on appeal.

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s/Gaut  
J.

We concur:

s/Ramirez  
P. J.

s/McKinster  
J.